Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application

FEDERAL COURT (KUALA LUMPUR) — APPLICATIONS NO 08–93 OF 1997(S) AND 08–94 OF 1997(S)
CHONG SIEW FAI CJ (SABAH & SARAWAK), EDGAR JOSEPH JR AND MOHAMED DZAIDDIN FCJJ
25 NOVEMBER 1998

Civil Procedure *— Appeal — Leave to appeal — Applicants sought dismissal of Respondents' actions for want of prosecution — Rejected by High Court and Court of Appeal — Application for leave to appeal to Federal Court — Criteria for granting leave — Whether actions should be dismissed for 'general disinterestedness'*

The Applicants (Defendants) appealed to the Court of Appeal against the decision of Ian Chin J in refusing to strike out the Respondents' (Plaintiffs') actions in Suit No 351 of 1997 and Suit No 352 of 1997 for want of prosecution. The Court of Appeal dismissed the Applicants' appeal. The Applicants then made two applications pursuant to the provisions of s 96(a) of the Courts of Judicature Act 1964 for leave to appeal to the Federal Court against the orders of the Court of Appeal. Counsel for the Applicants argued that 'general disinterestedness' by itself was a ground for striking out of an action for want of prosecution, as there had been a delay in the listing of the actions.

Held, dismissing the applications:

The Federal Court exercises its power to grant leave to appeal in civil cases sparingly and will not grant such leave unless both of the following criteria are satisfied by an intending appellant: (i) the judgment of the Court of Appeal has raised a point of general principle which the Federal Court has not previously decided or a point of importance upon which further argument and a decision of the Federal Court would be to public advantage; and (ii) if the point is decided in favour of the intending appellant, there is a prima facie case for success in the appeal. It is not necessary for an intending appellant to demonstrate a probability and a reasonable likelihood of the appeal succeeding in the event of leave being granted. All he needs demonstrate is that on first impression, the appeal might succeed. If a decision depends on the application of a well-established principle to an individual set of facts, a further appeal to the Federal Court will be of no utility if it does not clarify or refine the principle. However, if there has been a consistent current of judicial opinion which may have been uniformly wrong, that may be enough for leave to be granted. Further, a judgment of the Court of Appeal which has been the subject of an unsuccessful application for leave to appeal does not carry greater authority than one which has gone unchallenged (see pp 260G–H, 263I, 264A–B and 265E–H).

In the present case, the facts were not such that the action should be struck out on the ground of 'general disinterestedness'. There was evidence to support the finding of Ian Chin J that the delay in the listing of the actions was the responsibility of the Registry and not of the Respondents. Even if 'general disinterestedness' was established as a sufficient ground for want of prosecution, it would remain necessary for a defendant to establish that the delay was caused by the plaintiff's conduct (see p 263A–D); *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Southern) Ltd* [1974] AC 689 followed.

[Bahasa Malaysia summary

Pemohon-Pemohon (Defendan-Defendan) telah merayu kepada Mahkamah Rayuan terhadap keputusan Ian Chin H yang enggan membatalkan tindakan Penentang-Penentang (Plaintif-Plaintif) di dalam Guaman No 351 tahun 1997 dan Guaman No 352 tahun 1997 atas sebab ketiadaan pendakwaan. Mahkamah Rayuan telah menolak rayuan Pemohon-Pemohon. Pemohon-Pemohon kemudiannya telah membuat dua permohonan menurut peruntukan s 96(a) Akta Mahkamah Kehakiman 1964 untuk kebenaran membuat rayuan kepada Mahkamah Persekutuan terhadap perintah-perintah Mahkamah Rayuan. Peguam bagi pihak Pemohon-Pemohon menghujahkan bahawa 'general disinterestedness' dengan sendirinya adalah satu alasan untuk membatalkan sesuatu tindakan atas sebab ketiadaan pendakwaan, memandangkan terdapatnya kelewatan di dalam penyenaraian tindakan-tindakan.

Diputuskan, menolak permohonan-permohonan:

Mahkamah Persekutuan melaksanakan kuasanya dalam memberikan kebenaran untuk membuat rayuan di dalam kes-kes sivil secara berhati-hati, dan kebenaran tidak akan diberikan melainkan kedua-dua kriteria berikut dipenuhi oleh bakal perayu: (i) penghakiman Mahkamah Rayuan telah menimbulkan satu perkara berkenaan dengan prinsip umum yang belum pernah diputuskan oleh Mahkamah Persekutuan atau satu perkara yang penting di mana penghujahan selanjutnya dan keputusan oleh Mahkamah Persekutuan akan memberi faedah kepada masyarakat awam; dan (ii) jika perkara tersebut diputuskan berpihak kepada bakal perayu, wujud kes prima facie untuk berjaya di dalam rayuan tersebut. Seseorang bakal perayu itu tidak perlu menunjukkan satu kebarangkalian dan kemungkinan yang munasabah bahawa rayuan tersebut akan berjaya jika kebenaran diberikan. Apa yang ia perlu tunjukkan ialah pada pandangan pertama, rayuan tersebut mungkin berjaya. Jika sesuatu keputusan itu bergantung kepada pemakaian satu prinsip yang utuh terhadap satu set fakta yang tersendiri, rayuan seterusnya kepada Mahkamah Persekutuan adalah tidak berguna jika ianya tidak menjelaskan atau menerangkan prinsip tersebut. Walau bagaimanapun, jika terdapat

satu arus yang konsisten berkenaan pendapat kehakiman yang mungkin salah, ianya mungkin mencukupi untuk kebenaran diberikan. Selanjutnya, satu penghakiman Mahkamah Rayuan yang telah menjadi subjek kegagalan satu permohonan untuk kebenaran membuat rayuan tidak mempunyai autoriti yang lebih tinggi daripada penghakiman yang tidak langsung dicabar (lihat ms 260G–H, 263I, 264A–B dan 265E–H).

Di dalam kes ini, fakta-faktanya tidak memperlihatkan bahawa tindakan tersebut perlu dibatalkan atas sebab 'general disinterestedness'. Terdapat keterangan untuk menyokong keputusan Ian Chin H bahawa kelewatan dalam penyenaraian tindakan-tindakan adalah disebabkan kesalahan Pejabat Pendaftaran dan bukannya Penentang-Penentang. Walaupun jika 'general disinterestedness' telah ditetapkan sebagai alasan yang memadai bagi ketiadaan pendakwaan, adalah perlu bagi seseorang defendan itu membuktikan bahawa kelewatan tersebut disebabkan oleh perbuatan plaintif (lihat ms 263A–D); *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Southern) Ltd* [1974] AC 689 diikut.]

Notes

For cases on leave to appeal, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 668–709.

Cases referred to

Ainsbury v Millington [1987] 1 All ER 929 (refd)
Armstrong, Re, Ex parte Gilchrist (1886) 17 QBD 521 (refd)
Beecham Group Ltd v Bristol Laboratories Ltd (1967) Bar Transcript No 110 (refd)
Buckle v Holmes [1926] 2 KB 125 (refd)
Dick v New York Life Insurance Co (1959) 359 US 437 (refd)
Fisher v Oldham Corp [1930] 2 KB 364 (refd)
George H Nolan (1956) (Pvt) Ltd v HA Watson & Co Ltd (1965) Bar Transcript No 98 (refd)
Modern Engineering (Bristol) Ltd v Gilbert-Ash (Southern) Ltd [1974] AC 689 (folld)
Pang Hon Chin v Nahar Singh [1986] 2 MLJ 145 (refd)
Sun Life Assurance Co of Canada v Jervis [1944] AC 111 (refd)
Wednesbury Corp v Ministry of Housing and Local Government (1965) House of Lords Journals (refd)
Wilson, Re [1985] 2 WLR 694 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 96(a)
Rules of the Federal Court 1995 rr 107(1), (2), 108(1)

John Cherryman QC (*Douglas Lind* and *Lawrence SH Thien* with him) (*Chau & Thien*) for the Applicants. A

Nicholas Warren QC (*Alexander Decena* and *Junior Koh Siew Hui* with him) (*Jayasuriya Kah & Co*) for the Respondents.

Juprin Wong-Adamal (Peguam Kanan Negeri) conducting a watching brief for the Sabah State Government. B

Cur Adv Vult

Edgar Joseph Jr FCJ (delivering judgment of the court): We sat for two days hearing these two applications made pursuant to the provisions of s 96(a) of the Courts of Judicature Act 1964 for leave to appeal from the orders of the Court of Appeal dismissing the Applicants' appeals from C orders of Ian Chin J refusing to strike out the Respondents' actions in Suit No 351 of 1997 and Suit No 352 of 1997 for want of prosecution, and at the conclusion of the arguments, we reserved our decision until the next day when we dismissed the same, with an intimation that we would be delivering a judgment in writing on a date to be announced. This we now do. The Applicants are the Defendants and the Respondents are the D Plaintiffs.

It is not the practice of this Court, nor as we understand it, the practice of the House of Lords, when sitting in its judicial capacity hearing applications for leave to appeal, to give explicit reasons for granting or refusing leave, save in circumstances where their Lordships considered that E they had no jurisdiction to entertain the application.

We would interpolate to remark that, unlike in this country, the sieve for English civil appeals to the House of Lords operates at two levels, that is to say, in the Court of Appeal and in the House of Lords.

Having said that, we hasten to add, in the words of Lord Diplock F speaking in the House of Lords in *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Southern) Ltd* [1974] AC 689 at pp 715–716: 'Refusal of leave to appeal does not imply approval by this House of a judgment sought to be appealed against. That judgment carries the same authority as any other unappealed judgment of the Court of Appeal — neither more nor less.' With this statement of principle we respectfully agree. The natural G tendency, therefore, to claim that a judgment of the Court of Appeal which has been the subject of an unsuccessful application for leave to appeal carries greater authority than one which has gone unchallenged, must be resisted.

The only reason why we thought it desirable that we should give a H judgment in writing in this case is because it affords us the opportunity to offer guidance, without in any way attempting to establish a rigid framework into which all new situations must be forced, when considering applications for leave to appeal from the judgments of the Court of Appeal to this Court in civil matters which, so far as relevant to the present case, are now controlled by the new s 96(a) of the Courts of Judicature Act 1964 which I provides:

A Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court —

(a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage.

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First of all, we should like to make the preliminary observation that the Federal Court as an apex court is a court apart, in the sense that over and above its role as a tribunal of review, it performs the vital function of C supervising the process of judicial lawmaking which is such an integral part of our common law system modified by statute. It is therefore salutary to remind ourselves of what Lord Roskill said, with reference to the right of appeal to the House of Lords (which we venture to suggest should apply with equal force, in principle, to this Court), in *Re Wilson* [1985] 2 WLR 694 at p 698C to D:

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> Your Lordships' House is only able, in any given year, to hear and determine a limited number of cases and it is important for the evolution of the law as a whole that those cases should be carefully chosen.

Similarly, here is what Mr Justice Frankfurter said, with reference to the E right of appeal to the United States Supreme Court, in *Dick v New York Life Insurance Co* (1959) 359 US 437 at pp 458–459:

> ... the judgments of this Court are collective judgments. Such judgments presuppose ample time and freshness of mind for private study and reflection in preparation for discussion at conference. Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be F adequate discussion; without adequate discussion there cannot be that fruitful interchange of minds which is indispensable to thoughtful unhurried decision and its formulation in learned and impressive decisions. It is, therefore, imperative that the docket [ie list of cases for hearing] be kept down so that its volume does not preclude wide adjudication. This can be avoided only if the Court rigorously excludes any case from coming here that does not rise to the G significance of inevitability in meeting the responsibilities vested in this Court.

Next, we need hardly emphasize that the application for leave to appeal to this Court should set forth shortly, the facts and points of law of such general importance as to make it appropriate for the consideration of this Court and conclude with summarized reasons for leave being granted. See H also r 107(1) and (2) of the Rules of the Federal Court 1995 as amended by PU(A) 379/98 for the formal requirements.

At the hearing of the application for leave, so far as it is possible to do so, the argument should be brief, succinct and concentrated.

Where leave to appeal is granted, the order granting leave may specify I the matters appearing in r 108(1).

As for appeals to the Court of Appeal where leave is required, these are dealt with in accordance with the principles enunciated in *Pang Hon Chin v*

Nahar Singh [1986] 2 MLJ 145. At first blush, one would think that on principle, the criteria for granting leave to appeal to the Federal Court (as in the House of Lords in England) should be more demanding. But, we note that under the relevant statutory provision with which we are concerned — to wit, s 96(a) of the Courts of Judicature Act 1964 — statutory recognition has been given to two of the three examples of issues as stated in *Pang Hon Chin* which justify a hearing before the Federal Court. In this regard, *Pang Hon Chin* relied upon the words of Esher MR in *Re Armstrong, Ex parte Gilchrist* (1886) 17 QBD 521 at p 528 and Bankes LJ in *Buckle v Holmes* [1926] 2 KB 125 at p 127. The one example given in *Pang Hon Chin* which has been conspicuously omitted from s 96(a) is 'where the applicant is able to demonstrate a prima facie case of error'. Moreover, taking s 96(a) at its full face value, the circumstances for granting leave applications in the Federal Court appear to be *limited* to the two situations stated therein, namely, 'a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage.'

So, does it mean that under s 96(a) all that an intending appellant for leave to appeal to the Federal Court needs to demonstrate is that the judgment of the Court of Appeal raises a point of law of the kind contemplated by the section and nothing more?

We think not. The paramount consideration is, of course, that the judgment of the Court of Appeal must, in the language of s 96(a), raise a question of general principle not previously decided by the Federal Court or a decision of importance on which further argument and a decision of the Federal Court would be to public advantage but these criteria are, in our view, *not* exclusive.

An assessment of the prospects of success should leave be given is, of course, an important factor which the Federal Court would have to take into account. So, for example, in *Wednesbury Corp v Ministry of Housing and Local Government* (1965) House of Lords Journals, the Appeals Committee of the House of Lords had, on 19 October 1965, refused the plaintiff's application for leave to appeal to the House of Lords and Lord Reid, in the course of argument in the application for leave to appeal, made the following revealing observation to Counsel for the plaintiff:

> I think the public importance of it is fairly clear, but you have also got, of course, to establish that there is a point of general importance to put before the House, and that you have a prima facie case for success.

Indeed, in the present case, it was this factor which we took into consideration when dismissing the applications. But, we hasten to add, that an application for leave should be dismissed not so much on the merits of the case — although that may have a bearing on the result of the application — as on the degree of public importance and on the necessity of the legal issue being finally resolved by the Federal Court.

Still on the present case, the point of law upon which the Applicants had relied in seeking leave to appeal was whether 'general disinterestedness' on the part of a plaintiff is a sufficient ground by itself for striking out an

A action. Even if learned Counsel for the Applicants were correct in his contention that 'general disinterestedness' by itself was a ground for striking out of an action for want of prosecution — and this is a point upon which we express no view — with respect, we were not persuaded that the facts were such that the action should be struck out on that ground.

B More particularly, there was evidence to support the finding of Ian Chin J that the delay in the listing of the actions was the responsibility of the Registry and not of the Respondents. To take the point further, there was nothing to indicate that even if the Respondents had taken the additional steps suggested by the learned Judge, the summons/trial would have been listed more promptly. Indeed, the record provided showed that numerous C requests by the Respondents for listing were consistently ignored by the Registry. We, therefore, upheld the submission of learned Counsel for the Respondents that such 'general disinterestedness' as might have existed had no effect on the listings. In our view, therefore, even if 'general disinterestedness' was established as a sufficient ground for want of prosecution, it would remain necessary for a defendant to establish that the D delay was caused by the plaintiff's conduct just as it is clearly established under the present law that a plaintiff must exhibit 'inordinate and inexcusable delay'. In those circumstances, we were of the view, that any attempt to achieve a reversal of the orders of Ian Chin J would not have had *any* prospect of success.

E The second factor which we took into consideration when dismissing these applications was this: because they concerned interlocutory appeals arising from decisions refusing to strike out the two actions, which had been affirmed by the Court of Appeal, this Court should be especially cautious in granting leave to appeal. To quote Lord Denning MR in *Beecham Group Ltd v Bristol Laboratories Ltd* (1967) Bar Transcript No 110: 'We do not as a rule F grant leave to appeal in interlocutory appeals.' The important factor here is the need for a speedy end to litigation.

For the avoidance of doubt, we consider it desirable to go further and lay down a more precise formulation of the principles governing the grant of leave to appeal to this Court, without in any way attempting to be G exhaustive, so that other factors not dealt with here may, on occasion, have to be taken into consideration.

Of cardinal importance would be the utility of the decision of the Federal Court on the question of law as a means either to clarify and develop a general principle of law in a manner likely to provide the solution H to many different individual problems or of providing the answer to a specific question of a recurring nature in practice.

Consequently, the mere fact that the judgment of the Court of Appeal has raised a point of general principle does not necessarily make it appropriate for consideration by the Federal Court; for if a decision depends on the application of a well-established principle to an individual I set of facts, a further appeal to the Federal Court will be of no utility if it will do nothing to clarify or refine the principle, so as to make it applicable to other situations in the future.

But, if an intending appellant could demonstrate that the judgment of the Court of Appeal raises a point of law of great general importance upon which there has been a consistent current of judicial opinion which may have been uniformly wrong, that may well be enough for leave to be granted. *Fisher v Oldham Corp* [1930] 2 KB 364 was a case where the question at issue was one of great importance to the public and illustrates how 'a line of authorities' may gradually grow in the wrong direction because one important precedent has escaped attention.

Similarly, a particular fact situation may be most unlikely to recur in the same form but yet may exemplify a type of situation on which authoritative guidance of the Federal Court would be of great utility.

On the other hand, in the field of contract, in a 'one-off contract', to wit, a contract which has been specially drafted for the parties to cater for a particular transaction in language which is unlikely to be reproduced in future contracts, or a 'one-off situation', that is to say, a set of facts which is unlikely to be repeated frequently in practice, that would be a good ground for exercising the discretion against the grant of leave.

However, where the same point of law has already occurred in a series of current disputes, even if the circumstances are only generally in pari materia, in other words, not precisely the same, there might well be justification for granting leave to appeal to the Federal Court. The case for the grant of leave would, of course, be stronger where the dispute turns upon the interpretation of contracts or clauses in general use in a particular trade.

Having said that, this Court does not sit to decide abstract or academic or hypothetical questions of law regarding which the parties are not in dispute. Thus, in *Ainsbury v Millington* [1987] 1 All ER 929, Lord Bridge said this (at pp 930–931):

> It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.

To the same effect is the case of *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111 which shows that the House of Lords cannot deal with academic questions in which either or both parties is not interested in the result of the appeal.

Again, a dissenting judgment in the Court of Appeal may be a decisive factor in considering whether to grant leave to appeal. See eg *George H Nolan (1956) (Pvt) Ltd v HA Watson & Co Ltd* (1965) Bar Transcript No 98 in which leave was granted 'in view of the difference of opinion'.

Yet again, as Lord Roskill said in *Re Wilson* [1985] 2 WLR 694 at p 698C to D:

> It may well be that leave is given in order that the relevant law may be authoritatively restated in clearer terms.

A It will be seen, therefore, that in applications for leave to appeal to this Court, 'public importance' will have to be weighed against the features of the particular litigation.

One final point. Does it necessarily follow, that in all cases where there is no real doubt as to the law on a particular point, leave to appeal *must* B necessarily be refused? The answer to this question is provided by these opening remarks of Bankes LJ in *Buckle v Holmes* [1926] 2 KB 125 (a mundane case on the facts in which the question was whether a cat is an animal for whose trespass its owner is liable). Here is what his Lordship said (at p 127):

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> We gave leave to appeal in this case, not because we thought there was any real doubt about the law, but because the question was one of general importance and one upon which further argument and a decision of this Court would be to the public advantage.

D It is obvious that the alternative statutory criteria for the grant of leave under s 96(a) merely repeats the statement of principle enunciated by Bankes LJ quoted above.

To sum up, without prejudice to the generality of what we have thus far said, the Federal Court exercises its sensitive power to grant leave to appeal E in civil cases sparingly and will not grant such leave unless *both* of the following criteria are satisfied by an intending appellant:

(1) the judgment of the Court of Appeal has raised a point of general principle which the Federal Court has not previously decided or a point of importance upon which further argument and a decision of F the Federal Court would be to public advantage; and

(2) if the point is decided in favour of the intending appellant, there is a *prima facie* case for success in the appeal.

For the avoidance of doubt, we would make the following observations G regarding criteria (2) (taken from Lord Reid's revealing observation to Counsel in the *Wednesbury Corp* case quoted above), which requires the court to form a provisional view of the outcome of the appeal. It is not necessary for an intending appellant to demonstrate a probability and a reasonable likelihood of the appeal succeeding in the event of leave being H granted because to impose such a requirement would be very near to actually hearing the appeal itself. All he needs demonstrate is that on *first impression*, the appeal *might* succeed. But nothing short of that will suffice.

Applications dismissed.

I Reported by David Lai